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REPORTS

OF MALAYSIAN AND SINGAPORE CASES DETERMINED IN THE HIGH COURTS, THE FEDERAL COURT OF MALAYSIA, THE COURT OF APPEAL AND THE COURT OF CRIMINAL APPEAL OF SINGAPORE, AND THE PRIVY COUNCIL.

PRIVY COUNCIL REPORT

PERDANA PROPERTIES BERHAD v. UNITED ORIENT LEASING COMPANY SDN. BHD.

[P.C. (Lord Diplock, Lord Russell of Killowen, Lord Bridge of Harwich, Sir John Megaw and Sir Owen Woodhouse) July 14 & October 15, 1981]

[Privy Council Appeal No. 35 of 1980]

Practice and Procedure — Distress — Execution — Claim by owner of goods — Goods leased to tenant — Notice of assumption of possession of goods given by owner — Distress Ordinance, 1951, ss. 10 & 12.

This was an appeal from the decision of the Federal Court reported in [1980] 2 M.L.J. 130. In this case the appellant had sought to distrain for rent on equipment used by its tenant, an emporium, at premises belonging to it. The respondent who owned the equipment had leased it to the emporium for use in its trade at the premises. The emporium had run into financial difficulties and suffered judgment at the suit of one or more creditors. The equipment and other articles at the premises were seized in execution of those judgments under orders of the Sessions Court by the bailiff of the Court. The respondent thereupon wrote to the emporium giving the emporium notice that as owner of the equipment, it was assuming immediate possession of the equipment under the lease agreements. In the meantime the appellant took out a warrant of distress and served it on the bailiff of the Sessions Court. Subsequently the Sessions Court ordered the release of the equipment to the respondent, the execution creditors not objecting. The equipment was released to the respondent but immediately afterwards it was or was purported to be seized under the warrant of distress. The respondent applied in the High Court for the release of the equipment but the judge of the High Court dismissed the application. On appeal to the Federal Court the appeal was allowed and the equipment was released to the respondent. The appellant obtained leave to appeal to the Yang di Pertuan Agong.

The question considered by the Privy Council in the appeal concerned the effect of sections 10 and 12 of the Distress Ordinance, 1951. The point was whether in the light of the letter given by the respondent to the emporium it could thereafter be said that the equipment was in the possession of the emporium by the consent and permission of the owner.

Held: (1) the consent to possession of the equipment was effectively withdrawn, by the letter sent by the respondent to the emporium and it was unnecessary in the circumstances that the leases should be wholly determined;

(2) the letter sufficiently indicated a withdrawal of consent to the continued possession of the equipment;

(3) the equipment was therefore no longer in the possession of the emporium by the consent and permission of the respondent and therefore the respondent was entitled to the release of the equipment.

Cases referred to:-

(1) *Times Furnishing Co. Ltd.* v. *Hutchings* [1938] 1 K.B. 775.

(2) *Smart Bros. Ltd.* v. *Holt* [1929] 2 K.B. 303.

PRIVY COUNCIL APPEAL FROM MALAYSIA.

John Stuart Coyer Q.C. (*Ong Ban Chai* and *G.S. Nijar* with him) for the appellant.

Gerald Godfrey Q.C. (*Wong Kim Fatt* with him) for the respondent.

Cur. Adv. Vult.

Lord Russell of Killowen (delivering judgment of the Board): This appeal involves a dispute between the appellant, which sought to distrain for rent arrears on equipment used by its tenant Emporium President and Supermarket ("emporium") at Johore Tower, Johore Bahru, and the respondent which owned the equipment which it had leased to emporium for use in its trade at those premises. Potentially the case raised a number of questions, but in the opinion of their Lordships the answer to one question is fatal to the success of this appeal, and it is not proposed to discuss other questions that otherwise might have arisen.

Emporium ran into financial difficulties in 1979 and suffered judgments at the suit of one or more creditors. On September 3, 1979 the equipment and no doubt other articles at the premises had been seized in execution of those judgments under orders of the Sessions Court by the bailiff of that court. On the same day the respondent wrote to emporium in the following terms: —

"3rd September 1979.

The Directors
Emporium President & Supermarket Sdn Bhd
Johor Tower Jalan Greja
Johor Baru
Johor.

Dear Sirs,

Re: Lease Agreements: 79-183
79-199

It has come to our knowledge that your company's trading premises in the Johor Tower, Johor Baru, is the subject of Orders of Attachment by your creditors today.

Accordingly, in accordance with Article 21(b) of the Lease Agreements and also your failure to pay the overdue rents, we hereby, without prejudice to the terms and conditions of the above two (2) Lease Agreements, give you notice that as owner of the equipment under lease to you, we are assuming immediate possession of our equipment under the above two (2) Lease Agreements.

Yours faithfully,
United Orient Leasing Co. Sdn. Bhd.
(Sgd)
NG SENG HUAT
Branch Manager."

On September 4, 1979 the appellant took out a warrant of distress for rent arrears: this however was not pursuant to a relevant court authority therefor, and on September 19 at the instance of the respondent, claiming ownership of the equipment, the High Court on that ground discharged the warrant of distress.

On the same date, September 19, 1979, the appellant took out a warrant of distress, this time with the authority of a Court Order (Suit No. 12 of 1979), and served it on the bailiff of the Sessions Court.

On October 22, 1979 the Sessions Court ordered the release of the equipment to the respondent, the execution creditors not objecting. It would seem that the equipment was released to the respondent by the bailiff pursuant to that order on October 22 but immediately afterwards was or was purported to be seized under the warrant of distress in Suit No. 12 of 1979.

On October 23, 1979 the respondent issued an originating motion in the High Court in the proceedings the subject of this appeal, seeking an order that the equipment be released to the respondent. On November 15, 1979 Anuar J. dismissed the motion with costs. On appeal by the respondent the Federal Court allowed the appeal on April 2, 1980. Final leave to appeal to the Yang di-Pertuan Agong was granted by the Federal Court on August 4, 1980.

The one question for discussion already mentioned arises under sections 10 and 12 of the Distress Ordinance, 1951 (No. 28 of 1951).

Section 10, so far as now material, provides that:—

"Where any moveable property ... of any ... person ... not being a tenant of the premises or of any part thereof, and not having any beneficial interest in any tenancy of the premises or any part thereof, has been seized under a warrant of distress issued to recover arrears of rent due to a superior landlord by his immediate tenant, such ... person may apply to a judge ... to release a distrained article."

It is not disputed that the respondent is the owner of the equipment and otherwise fulfils the criteria of section 10: thus there was jurisdiction to order the release of the equipment in these proceedings to the respondent if section 10 applies.

It was however contended for the appellant that section 10 was excluded by section 12. Section 12, so far as material, provides as follows: —

"The provisions of section 10 shall not apply

(1) ... to goods in the possession, order, or disposition of such tenant by the consent and permission of the true owner under such circumstances that such tenant is the reputed owner thereof;"

The short point is whether in the light of the letter dated September 3, 1979 it could thereafter be said that the equipment was in the possession of the emporium by the consent and permission of the respondent. Counsel for the appellant accepted that he must surmount that hurdle at the outset (and before any discussion of reputed ownership) if he was to dispute the availability of section 10.

It was accepted that consent to possession could be effectively withdrawn by a communication simply from the respondent to emporium, without the need to inform e.g. the landlord. But it was contended (1) that for effective withdrawal of consent it was necessary that the lease of the equipment should be wholly determined, which the letter of September 3 did not purport to do; (2) that that letter in the light of the language of the equipment leases was in any event not an act which would convey to emporium that consent was withdrawn.

On point (1), their Lordships' attention was drawn to the cases of *Times Furnishing Co. Ltd.* v. *Hutchings*[1] and *Smart Bros. Ltd.* v. *Holt*[2] in the first of which it was held that though the hire purchase agreement was terminated the consent was not withdrawn, and in the second of which the agreement was terminated. These cases do not establish that the relevant consent cannot be withdrawn unless the relevant agreement of lease or hire is terminated, and their Lordships do not accept the proposition. Suppose the letter of September 3 were to have said expressly "Accordingly our consent to your continued possession of the equipment is hereby withdrawn", their Lordships do not see why that should not have effect according to its tenor: and in their Lordships' view that express statement is inherent in the letter which could not be understood in any other sense by emporium.

On point (2) it is necessary to look at the clauses of the lease agreements (in identical form) referred to in the letter.

Article 21, so far as relevant, provides as follows: —

"Should any one of the following events take place the Lessor may without any prior notice or demand to the Lessee exercise any or all of the remedies as provided for in paragraph (1) of Article 17 hereof and the effects thereof shall be the same as those provided for in paragraph (2) of Article 17:—

(b) on the Lessee being the subject of any writ of execution or distress, attachment or disposition (regardless of whether or not the same affects the Equipment)...."

Article 17, so far as relevant, provides as follows: —

"(1) If the Lessee fails to pay the Rent provided for in Article 3 hereof after the same becomes due and payable or any other sums and monies due and payable under this Lease Agreement or if the Lessee fails to observe or perform all and any provision of this Lease Agreement or if the Lessor shall on any reasonable ground consider itself insecure the Lessor shall without prejudice to any pre-existing liability of the Lessee to the Lessor have the right forthwith to exercise all or any of the following remedies without having to give any prior notice or demand to the Lessee:—

(b) to take possession to the Equipment or demand its return;

(c) to terminate the lease hereby created and to demand from the Lessee the full amount of the Agreed Loss Value and in addition thereto to claim from the Lessee for compensation for all loss and damages including but not limited to loss of profits.

(2) Even if any of the remedies provided for in sub-paragraphs (a) and (b) of the paragraph (1) of this Article have been taken by the Lessor, the Lessee shall not be relieved from any other liability under this Lease Agreement including but not limited to liability for damages."

The contention was that the letter of September 3 was a bad notice because it does not fit the language of articles 21 and 17 of the equipment leases. Their Lordships do not accept the relevance of that comment even if it were justified. The whole question is whether the letter sufficiently indicates a withdrawal

of consent to continued possession of the equipment: and, as already stated, in their Lordships' opinion it clearly does.

Accordingly their Lordships are of the opinion that this appeal must be dismissed, with costs, and they advise His Majesty the Yang di-Pertuan Agong accordingly.

Appeal dismissed.

Solicitors: *Nabarro Nathanson; Coward Chance.*

SINGAPORE REPORTS

PEOPLE'S PARK DEVELOPMENT PTE. LTD. v. TRU-MIX CONCRETE (PTE.) LTD.

[C.A. (Wee Chong Jin C.J., Lai & Chua JJ.) October 5, 1981]

[Singapore — Civil Appeal No. 72 of 1978]

Practice and Procedure — Interest — Whether court had power to award interest — Whether there was a debt within meaning of paragraph 7 of First Schedule, Supreme Court of Judicature Act (Cap. 15) — Civil Law Act (Cap. 30), s. 9 — Supreme Court of Judicature Act (Cap. 15), s. 18(2).

The appellants (defendants in the action) appealed against the order of the High Court ordering the appellants to pay to the respondents interest on the sum of $61,861.03 at the rate of 8% per annum from the date of the filing of the writ to the date of settlement on October 25, 1978.

The respondents claimed against the appellants for the sum of $161,861.03 for goods sold and delivered to the appellants. A sum of $100,000 had already been paid by the appellants leaving a balance of $61,861.03. The appellants then filed a defence and counterclaim on June 27, 1975. On October 25, 1978, the day fixed for the hearing of the action, the appellants paid up the sum of $61,861.03. The parties agreed to withdraw their claim and counterclaim respectively and also agreed that costs be taxed and paid by the appellants. However, they could not reach a settlement as to the question of payment of interest on the $61,861.03 which the respondents wanted. The parties proceeded with the hearing on that issue alone before the learned judge.

Held, dismissing the appeal: (1) the court had no power to award interest to the respondents under section 9 of the Civil Law Act (Cap. 30); however, there was clearly a debt within the meaning of paragraph 7 of the First Schedule to the Supreme Court of Judicature Act (Cap. 15);

(2) when the learned judge was asked to decide on the respondents' claim for interest the action had not been discontinued and the respondents had not yet withdrawn their claims which included a prayer for "any other reliefs which this Honourable Court shall deem fit."

Case referred to:-

(1) *The "Medina Princess"* [1962] 2 L1.R. 17.

CIVIL APPEAL.

P. Balachandran for the appellants.

K.K. Tang for the respondents.

Chua J. (delivering the judgment of the Court): The appellants (defendants in the action) appeal against the Order of the High Court ordering the appellants to pay to the respondents interest on the sum of $61,861.03 at the rate of 8% per annum from the date of the filing of the writ to the date of settlement on October 25, 1978.

The respondents are suppliers of ready-mix concrete and they sold and delivered to the appellants ready-mix concrete to the value of $161,861.03. This sum had remained outstanding since December 1974, and after repeated demands the appellants paid the respondents on January 20, 1975, a sum of $50,000 leaving a balance of $111,861.03 still due and owing.

On March 25, 1975, the respondents took out a writ against the appellants claiming the sum of $111,861.03 and costs. On March 29, 1975, the appellants paid to the respondents the sum of $50,000 leaving a balance of $61,861.03. The appellants filed a defence and counterclaim on June 27, 1975.